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No. 83-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

JAMES G. WATT, *et al.*, and
WALKER RIVER PAIUTE TRIBE OF NEVADA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JOHN H. CHEATHAM, III, ESQUIRE
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

ATTORNEY FOR
Interstate Natural Gas Association of America

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AMICUS CURIAE BRIEF

This amicus curiae brief is respectfully submitted by the Interstate Natural Gas Association of America (INGAA) in support of the Petition for Writ of Certiorari of the Southern Pacific Transportation Company.

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit national trade association representing virtually all of the major long-distance natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, *et seq.*), the Department of Energy Organization Act (42 U.S.C. § 7101, *et seq.*) and the Natural Gas Policy Act (15

U.S.C. § 3301, *et seq.*). A list of INGAA's membership is set forth in the appendix to this brief.

There are hundreds of miles of interstate natural gas pipelines being operated across Indian lands. The right-of-way permits for such facilities have generally been obtained from the Secretary of Interior pursuant to the Act of March 4, 1904 (the "1904 Pipeline Right-of-Way Act"), codified at 25 U.S.C § 321 (1976), and the Act of February 5, 1948 (the "1948 General Right-of-Way Act"), codified at 25 U.S.C. § 323-328 (1976). Such permits are issued for a limited term, usually 20 years.[1] When they expire, new or renewal permits are required. The decision of the Ninth Circuit affirming the Secretary's consent regulation (25 C.F.R. § 169.3 (1982)) puts these facilities and the services provided by them in jeopardy.

Under § 169.3, tribal consent is required as a condition to the issuance of all permits for rights-of-way across Indian lands. With literally hundreds of millions of dollars in pipeline facilities in place under permits which have expired or are about to expire, the consent requirement, if upheld with respect to the 1904 Pipeline Right-of-Way Act, would enable the tribes to cause the removal or discontinuation of the use of such facilities in the absence of agreement between the natural gas company and the tribe on the compensation to be paid. It could likewise cause the termination of service provided by such facilities or the uneconomic relocation of facilities around Indian lands.

In addition, by conditioning all rights-of-way across tribal lands on tribal consent, § 169.3(a) vests broad pow-

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[1] The 1904 Act provides for a 20-year term with the right of an additional 20-year extension to be granted by the Secretary. 25 U.S.C. § 321 (1976).

er in the tribes to block construction by INGAA's members of new pipeline projects that contemplate facilities across Indian lands or, alternatively, to require additional expenditures to reroute facilities around tribal lands.

Under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(b) (1976), INGAA's members, as regulated natural gas companies, cannot discontinue or abandon service without the authorization of the Federal Energy Regulatory Commission. The refusal of an Indian tribe to consent to the grant or renewal of a permit when existing facilities are in operation could preclude continuation of service or impose a severe financial burden on the natural gas company and its customers through exorbitant demands of the tribe for the granting of its consent.[4]

The rates at which INGAA's members sell gas to their respective customers are regulated by the Federal Energy Regulatory Commission under the Natural Gas Act. In many instances, INGAA's members find that they are losing sales to lower-cost alternative fuels. Additional costs associated with the necessity of paying whatever price is demanded by tribal authorities for the issuance of the consent necessary to satisfy the requirements of § 169.3 can substantially affect the ability of INGAA's members to compete with alternative fuels for service to their customers.

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[4] Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) (1976) provides specifically that a natural gas company holding a certificate of public convenience and necessity can acquire necessary rights-of-way through exercise of the right of eminent domain where an agreement with the owner of the property cannot otherwise be reached. The applicability of this Section to rights-of-way across tribal lands has not been specifically addressed by the courts.

It is because of these fundamental and significant interests that INGAA submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

CONSENT OF PARTIES

Amicus is filing this brief with the consent of the parties, whose letters of consent have been filed with the Clerk.

ARGUMENT

The Ninth Circuit's decision has ramifications far beyond the facts of this case. While it is an 1899 Railroad right-of-way statute which is involved here,[1] the regulation if upheld as a valid exercise of the rulemaking authority of the Secretary covers all rights-of-way across Indian lands. It would, therefore, unlawfully delegate to the Indian tribes authority to enable them to preclude new rights-of-way permits or the renewal of rights-of-way permits across Indian lands and, in cases where consent is given, to fix the compensation which must be paid the tribe for such consent. Plainly, the tribe cannot be expected to consent if an agreement on compensation is not reached.

There are a number of right-of-way statutes similar to the 1899 Railroad Right-of-Way Act involved here. These include not only the 1904 Pipeline Right-of-Way Act, but right-of-way acts covering telephone and telegraph lines, power lines, and other facilities servicing the public. *See*, 25 U.S.C. § 319 (1976).

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[1] 25 U.S.C. § 312-318 (1976).

In certain instances, Congress has conditioned the issuance of rights-of-way permits upon tribal consent.[4] In other cases, however, the right-of-way has been expressly granted by statute, as with the 1899 Act, or the authority has been delegated to the Secretary to issue right-of-way permits and to determine the amount of compensation to be paid for such permits, as is the situation under the 1904 Pipeline Right-of-Way Act. It is submitted that the Secretary cannot lawfully delegate to the Indian tribes the authority to prevent the exercise of the power delegated to him by Congress. *See Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942); *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 122-23 (1928); *Eubank* v. *City of Richmond*, 226 U.S. 137, 143-44 (1912). *See also Montana* v. *United States*, 450 U.S. 544, 564 (1981); *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Whether the Secretary has exceeded his authority in requiring tribal consent for all rights-of-way as provided in 25 C.F.R. § 169.3(a) (1982) is clearly a matter of extreme importance not only to the railroads, pipelines, and the other utility companies affected, but also to the public they serve.

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[4] For example, the 1948 General Right-of-Way Act requires consent with respect to certain specified Indian tribes. 25 U.S.C. § 324 (1976) Other examples are Act of August 5, 1882, ch. 394, 22 stat. 299; Act of May 30, 1888, ch. 336, 25 stat. 160; Act of May 8, 1890, ch. 198, 26 stat. 102; Act of February 18, 1895, ch. 95, 28 stat. 665.

CONCLUSION

Certiorari should issue so that this Court can review and correct the erroneous decision of the Ninth Circuit.

Respectfully submitted,

JOHN H. CHEATHAM, III
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

ATTORNEY FOR
Interstate Natural Gas Association of America

APPENDIX

APPENDIX

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA MEMBERSHIP

Active Membership

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
American Natural Resources Company
Black Marlin Pipeline Company
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Continental Resources Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
InterNorth, Inc.
Kansas-Nebraska Natural Gas Company, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
Mid Louisiana Gas Company
Mississippi River Transmission Corporation
Mitco Pipeline Company
Natural Gas Pipeline Company of America
Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Company
Panhandle Eastern Corporation
Ringwood Gathering Company
Southern Natural Gas Company
Tennessee Gas Transmission
Texas Eastern Transmission Corporation
Texas Gas Resources Corporation
Transco Energy Company
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
Western Transmission Corporation .

Associate Members

Amoco Production Company
ARCO Oil and Gas Company
Arkansas Louisiana Gas Company
Atlanta Gas Light Co.
The Brooklyn Union Gas Co.
Chevron U.S.A., Inc.
Conoco Inc.
Enstar Petroleum, Inc.
Entex, Incorporated
Exxon Company, U.S.A.
Forest Oil Corporation
Getty Oil Company
Gulf Oil Exploration and Production Company
John H. Hill
HNG Fossil Fuels Company
HNG Oil Company
Kinsey Interests, Inc.
Laclede Gas Company
LGPC Explortion, Inc.
The Louisiana Land & Exploration Company
Marathon Oil Company
Minerals, Inc.
Mitchell Energy & Development Corp.
Mobil Oil Corporation
National Fuel Gas Company
Natural Resources Corporation
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Southern Union Production Company
Sun Gas Company
Union Oil Company of California